



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00002/2015

THE IMMIGRATION ACTS

Heard at Field House
On 15 February 2016

Decision & Reasons Promulgated
On 21 March 2016

Before

UPPER TRIBUNAL JUDGE STOREY

Between

[F A]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms F Allen of Counsel instructed by Warnpala & Company
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Somalia. He entered the UK when he was around 15 and claimed asylum in December 2000. He was granted refugee status in May 2001 on the basis

that he was a member of a minority clan. On 20 December 2012 he was convicted on two counts of possession of Class A drugs with intent to supply/supplying and was sentenced to 3 years 10 months imprisonment.

2. In March 2013 the appellant was issued with a notice of liability of intention to deport and on 6 December 2013 the respondent issued him with a section 72 notice under the Nationality, Immigration and Asylum Act 2002 giving him the opportunity to rebut the presumption that he had been convicted of a particularly serious crime and was a danger to society.

3. On 18 Feb 2014 the respondent notified the appellant of her intention to cease his refugee status by way of a revocation decision taken under para 339A of the Immigration Rules. On 23 February 2015 the respondent made a deportation order against him as a foreign criminal under s.32(5) of the UK Borders Act 2007 and a decision to revoke the appellant's refugee status. In the notice and decision letters that accompanied these decisions it was stated that given the improvement of the situation in Mogadishu and the latest country guidance case of MOJ & Ors (Return to Mogadishu) (Rev 1) (CG) [2014] UKUT 442 (IAC), the appellant would no longer be at real risk of persecution or ill treatment on return even though he was a member of a minority clan (the Reer Hamar/Benadiri). It was also stated that the appellant did not meet the requirements of the Immigration Rules and had not demonstrated compelling circumstances such as to warrant exempting him from deportation on Article 8 grounds.

4. The appellant appealed against the deportation and revocation decisions. In a decision sent on 21 October 2015 the First-tier Tribunal (FtT) (Judge Parkes and Mr Sandall) dismissed his appeal. The FtT concluded that the situation in Somalia was now significantly different from that which prevailed in 2000/2001 when the appellant left and as a result the respondent was entitled to decide he had ceased to be a refugee. The FtT went on to say that in any event the appellant was caught by the provisions of s.72 albeit his case had not been certified, stating: "[i]t is for the Appellant to show that he is not to be regarded as a danger to the community. Whilst the reports he relies on are supportive of him we cannot overlook the seriousness of what he [did] and the sentencing remarks." The FtT also rejected the appellant's appeal on EEA grounds and under the Immigration Rules on Article 8 and deportation.

5. The grounds of appeal brought by the appellant (both those dated 26 October 2015 and those dated 29 November 2015) raise two points: that the FtT had given no consideration of humanitarian protection in the decision; and that at [29] the judge had failed to make findings as to whether the claimant is to be regarded as a danger to the community. In relation to the first ground, attention was drawn to an addendum skeleton argument and an expert report of Professor Aguilar dated 21 September 2015 which were before the FtT and were said to show that the appellant would become an Internally Displaced Person and would have to live in an IDP camp.

6. In submissions before me Ms Allen contended first of all that the FtT had not made a proper finding, as was required by s.72, on whether the appellant was a danger to the

community, especially given that the appellant had made considerable efforts since his convictions to rehabilitate, which was supported by the documentation and reports placed before the FtT.

Ms Allen's submitted secondly that the FtT had not correctly applied the guidance given in MOJ & Others which stated that when considering return to Mogadishu regard should be had to the period of absence from Somalia and the presence or otherwise of family support. It required there to be a careful assessment of the evidence. The FtT had applied MOJ & Others in generic fashion without regard to the appellant's particular circumstances. The FtT had not addressed humanitarian protection.

7. Mr Wilding maintained that if the appellant was properly found to have ceased to be a refugee, the s.72 notice/decision did not bite. As regards humanitarian protection, it was for the appellant to show he would be at risk on return and the appellant had not done so. The FtT considered the expert report of Professor Aguilar, a report which was problematic in any event, given that it was largely a disagreement with MOJ & Others rather than an objective assessment taking into account evidence on all sides. He cited the Tribunal case of AAW (expert evidence-weight) [2015] UKUT 673 as support for his criticisms of the Professor's report. The appellant had not shown that he would not receive remittances from members of his family in the UK. It had also to be borne in mind that the appellant would be eligible for a Facilitated Return, which would mean he would not be returned in destitution or have to go to an IDP camp. The appellant had worked in the UK and had transferable skills.

8. I am not persuaded that the grounds identify any material error of law.

9. As regards the s.72 issue, it does not appear that the respondent proceeded to certify the appellant's case under s.72, notwithstanding that she had sent him a notice of intention to do so. If that is right, then it is likely to have been because in the meantime, in the light of MOJ & Others, she had decided to take cessation action against him instead. In any event, as a matter of law, once a person ceases to be a refugee, they fall outside the scope s.72 and any certificate made under it would simply fall away. Section 72(1) states that "This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection)". Article 33(2) applies only to person who are refugees. ("The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding..."). I would add that in any event, insofar as the grounds seek to rely on the failure by the FtT to consider the evidence of the appellant's rehabilitation, they clearly did consider that and reached a firm view about it: see the final sentence of [29].

10. Even if I am wrong about the s.72 issue, and even assuming it were considered the FtT had been wrong to conclude that the appellant fell within the terms of s.72, any such error could not be material in this case unless there was material error in the cessation decision to revoke refugee status or in the corresponding decision that the appellant was not entitled to humanitarian protection.

11. The grounds set much store by the argument that the FtT failed to address the appellant's situation under the humanitarian protection provisions, particularly as regards the provision in the Rules(339C) transposing Article 15c of the Qualification Directive. However, although it is true that [22]-[29] of the decision are placed under the heading "Refugee Status", and there is no specific heading for "Humanitarian Protection Status", it is clear from the assessment made by the FtT considered as a whole that: (a) it did not consider that the appellant had established he would any longer face risk on return of any kind (which would also cover Article 3 ECHR risk); (ii) when making its assessment in these paragraphs it can be understood to have borne in mind its earlier self-reminder at [14]-[16] that if an application for asylum is unsuccessful, then in order to succeed on humanitarian protection grounds an appellant must show that there are substantial grounds for believing that if returned to his country of origin [he] would face a real risk of suffering serious harm and that "[i]n the event that an application for asylum and humanitarian protection is not allowed consideration must be given to whether the return of the Appellant to their country of origin would place the UK in breach of its obligations under the ECHR"; (iii) in the grounds of appeal the only humanitarian protection matter identified concerned Article 15c of the Qualification Directive which requires an assessment of whether there is a real risk of an applicant facing harm on the basis of indiscriminate violence in situations of armed conflict. In [27] the FtT states that it is permissible to depart from the findings of a country guidance case but evidence is required to show that such an approach is warranted in a particular case:

"We note the other evidence provided by the Appellant's representatives but that is of a general nature, it confirms that there is internal armed conflict within Somalia but it does not show that the conclusions reached by the Upper Tribunal were erroneous or do not apply to the Appellant".

12. A further point ((iv)) is that the appellant's grounds wholly fail to appreciate that the guidance given in MOJ & Others was specifically confined to Article 15c, i.e. to the issue of humanitarian protection. That is clear from the headnote to this decision, which states under the sub head Country Guidance, as follows:

"(i) *The country guidance issues addressed in this determination are not identical to those engaged with by the Tribunal in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 445 (IAC). Therefore, where country guidance has been given by the Tribunal in AMM in respect of issues not addressed in this determination then the guidance provided by AMM shall continue to have effect.*

(ii) *Generally, a person who is "an ordinary civilian" (i.e. not associated with the security forces; any aspect of government or official administration or any NGO or international organisation) on returning to Mogadishu after a period of absence will face no real risk of persecution or risk of harm such as to require protection under Article 3 of the ECHR or Article 15(c) of the Qualification Directive. In particular, he will not be at real risk simply on account of having lived in a European location for a period of time of being viewed with suspicion either by the authorities as a*

possible supporter of Al Shabaab or by Al Shabaab as an apostate or someone whose Islamic integrity has been compromised by living in a Western country.

- (iii) *There has been durable change in the sense that the Al Shabaab withdrawal from Mogadishu is complete and there is no real prospect of a re-established presence within the city. That was not the case at the time of the country guidance given by the Tribunal in AMM.*
- (iv) *The level of civilian casualties, excluding non-military casualties that clearly fall within Al Shabaab target groups such as politicians, police officers, government officials and those associated with NGOs and international organisations, cannot be precisely established by the statistical evidence which is incomplete and unreliable. However, it is established by the evidence considered as a whole that there has been a reduction in the level of civilian casualties since 2011, largely due to the cessation of confrontational warfare within the city and Al Shabaab's resort to asymmetrical warfare on carefully selected targets. The present level of casualties does not amount to a sufficient risk to ordinary civilians such as to represent an Article 15(c) risk.*
- (v) *It is open to an ordinary citizen of Mogadishu to reduce further still his personal exposure to the risk of "collateral damage" in being caught up in an Al Shabaab attack that was not targeted at him by avoiding areas and establishments that are clearly identifiable as likely Al Shabaab targets, and it is not unreasonable for him to do so.*
- (vi) *There is no real risk of forced recruitment to Al Shabaab for civilian citizens of Mogadishu, including for recent returnees from the West.*
- (vii) *A person returning to Mogadishu after a period of absence will look to his nuclear family, if he has one living in the city, for assistance in re-establishing himself and securing a livelihood. Although a returnee may also seek assistance from his clan members who are not close relatives, such help is only likely to be forthcoming for majority clan members, as minority clans may have little to offer.*
- (viii) *The significance of clan membership in Mogadishu has changed. Clans now provide, potentially, social support mechanisms and assist with access to livelihoods, performing less of a protection function than previously. There are no clan militias in Mogadishu, no clan violence, and no clan based discriminatory treatment, even for minority clan members.*
- (ix) *If it is accepted that a person facing a return to Mogadishu after a period of absence has no nuclear family or close relatives in the city to assist him in re-establishing himself on return, there will need to be a careful assessment of all of the circumstances. These considerations will include, but are not limited to:*
- *circumstances in Mogadishu before departure;*
 - *length of absence from Mogadishu;*
 - *family or clan associations to call upon in Mogadishu;*

- access to financial resources;
 - prospects of securing a livelihood, whether that be employment or self employment;
 - availability of remittances from abroad;
 - means of support during the time spent in the United Kingdom;
 - why his ability to fund the journey to the West no longer enables an appellant to secure financial support on return.
- (x) *Put another way, it will be for the person facing return to explain why he would not be able to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that returnees are taking jobs at the expense of those who have never been away.*
- (xi) *It will, therefore, only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return who will face the prospect of living in circumstances falling below that which is acceptable in humanitarian protection terms.*
- (xii) *The evidence indicates clearly that it is not simply those who originate from Mogadishu that may now generally return to live in the city without being subjected to an Article 15(c) risk or facing a real risk of destitution. On the other hand, relocation in Mogadishu for a person of a minority clan with no former links to the city, no access to funds and no other form of clan, family or social support is unlikely to be realistic as, in the absence of means to establish a home and some form of ongoing financial support there will be a real risk of having no alternative but to live in makeshift accommodation within an IDP camp where there is a real possibility of having to live in conditions that will fall below acceptable humanitarian standards."*

13. The Rules mirror the Qualification Directive in applying cessation clauses both in respect of refugee status (339A) and humanitarian protection status (339G). Of course, application of the cessation provisions requires it to be shown that the change in the circumstances in the country of origin is durable and non-temporary. Although MOJ & Others were not addressing a cessation case, it is quite clear that the considered the change in circumstances to be non-temporary and durable.

14. The grounds also avow, and this was the main point pressed by Ms Allen in submissions, that the FtT failed to apply or adhere to the guidance set out in MOJ & Others. It is something of a struggle to discern this point in the appellant's written grounds, Be that as it may, I disagree with this submission. Adverting to the wording of the head note in MOJ & Others, whilst it is true the Tribunal emphasized the importance of examining an appellant's particular circumstances, it also made clear that the onus of proof is on the appellant and that: "*...it will be for the person facing return to explain why he would not be able to access the economic opportunities that have been produced by the economic boom, especially as there is evidence to the effect that returnees are taking jobs at the expense of those who have never been away.*"

15. In the appellant's case the respondent's notice/decision letters had based themselves on the guidance in MOJ & Others and had concluded, as the FtT noted at [23], that in the light of that guidance:

“the Appellant could return to Mogadishu, he is a young man with no health problems and has acquired skills that he could use on return. Despite the Appellant's claim that his parents had died records showed a phone number for his father. His clan membership would not be relevant...”

16. In his grounds of appeal against the respondent's decision the appellant relied essentially on general evidence relating to conditions in Mogadishu and Somalia, including the report of Professor Aguilar; the FtT specially observed at [27] that this evidence was “of a general nature”. Whilst therefor the FtT can be criticised for not addressing the appellant's particular circumstances in more detail, its reasoning made clear that faced with the purely general response made by the appellant to the respondent's assessment that his particular circumstances did not bring him within any of the MOJ & Others risk factors, they were not satisfied that the appellant had established a real risk of serious harm based on any circumstances taking his case out of the ordinary case of a single young man returning after a considerable lapse of time.

17. Ms Allen seeks to rely on the contents of the appellant's witness statement, but it is clear that the FtT did not accept his own account of having no family network in Mogadishu. Read together with representations made on his behalf, the appellant's statement, sent on 7 March 2014 itself makes clear why it was reasonable of the respondent and in turn the FtT to assume that on return the appellant would have transferable skills. He had said that he started working in 2003 with NYK Logistics, Northampton and worked for them until 2008; and, prior to being made redundant he had been promoted to Warehouse Supervisor controlling 30 people in the establishment. The appellant had also started training to obtain a mini cab driver licence. In prison he had obtained a number of certificates of achievement, including barber, drugs awareness and family relations.

18. It is necessary for completeness to address one particular aspect of the appellant's case relating to the fact that he has been accepted to be a member of a minority clan. The guidance given in MOJ & Others identified lack of membership of a majority clan as a relevant factor in assessing risk on return. However, it is not in dispute that the appellant's minority clan is Reer Hamar which is considered to be part of or closely interconnected with the Benadairi clan. In her reasons for refusal letter the respondent devoted considerable space to addressing whether the background country evidence identified any particular risk to the Reer Hamar. Her conclusion was that “the Reer Hamar/Benadairi are not considered marginalised...They are exploited but not marginalised” [28]. At [29] the respondent noted that specific clan protection was no longer important as individuals who require protection can approach the police, elders or their local MP and in this way obtain protection from the authorities. It was also noted that:

“Further to this, Mogadishu is home to a sizeable Benadairi population, and it is reasonable for you to live amongst your own clan within the city. In your asylum

statement you mentioned that your parents went missing and that your sister sought refuge with your uncle. On your return you can seek and re-establish ties with your sisters and uncle. You would also have the opportunity to find your parents. If there remains a network of extended relative or extended relations in Somalia, you could re-establish ties with them...”

19. It can thus be seen that the respondent had addressed the appellant’s minority clan status and given clear reasons why it was not considered this would give rise to risk to the appellant. The FtT clearly considered this evidence, alongside the other materials produced to it. In light of that evidence, it cannot be considered an error for the FtT not to have addressed the appellant’s clan position further. Given the appellant’s transferable skills, there was no reason to consider he would be exploited.

20. For completeness I would record that the appellant’s grounds of appeal did not challenge the FtT decision as regards the appellant’s EEA grounds and Article 8 grounds. Even if a challenge had been raised, I am quite satisfied that the appellant had no realistic prospect of success on either ground. His wife by religious marriage was in the Netherlands and so the appellant could not come within the personal scope of the Citizens Directive even assuming his wife had Dutch nationality. There was no evidence to show that the appellant had close ties with his children or that their care and welfare was been negatively affected by his absence from their lives.

21. For the above reason the FtT did not materially err in law and its decision dismissing the appellant’s appeal must stand.

Signed

Date

Judge of the Upper Tribunal